IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JODHPUR
:::

ORDER

S.B. Civil Writ Petition No.5955/2003 – Subhash Chandra Kulhari Vs. State of Rajasthan & Ors. under Article 226 of the Constitution of India.

Date Of Order :: 1st December,2006.

PRESENT

Hon'ble Mr. Justice Mohammad Rafiq

Mr. P.S. Bhati, Advocate for petitioner.
Mr. R. Dave, Dy. Government Advocate, for the respondents.

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The petitioner has prayed for writ of mandamus to the respondents directing them to appoint him on the post of Physical Training Instructor Grade-III. His grievance is that though he has secured 80.11% marks in the merit list prepared by the respondents yet he has not been appointed whereas last candidate in the general merit who secured only 80.05 marks, much lesser than him was appointed.

On perusal of the reply to the writ petition it becomes clear that the respondents while making the appointment in

the selection process initiated pursuant to advertisement issued in the year 2003 have not correctly applied the rule of reservation inasmuch as the candidates who belongs to Other Back Ward Community have although been considered against the posts reserved for O.B.C. but they have been completely excluded for being considered against the general seats. This has resulted into compartmentalization of the vacancies where the right to consideration of reserved category candidates has been restricted only against the posts reserved for them. This Court in Smt. Kavita Choudhary Vs. State of Rajasthan & Ors. (S.B. Civil Writ Petition No.5510/2003), decided on 18th Sept., 2006) on consideration of the entire case law on the subject including the constitution Bench judgment of the Hon'ble Supreme Court in Indra Sawhney Vs. Union of India reported in 1993 SC 477 held as under: -

> "Examined in the light of the settled proposition of law as discussed above, it would be evident that the respondents in the present case have mis-applied the law of reservation. This would be evident from a bare perusal of their reply which shows the respondents have prepared separate merit lists for each of categories, namely, general category, OBC SC and ST. In doing so, they have completely excluded consideration of candidates belonging to OBC against the vacancies meant for general quota

just because the OBC candidates in their application forms requiring them to fill up their category in the relevant column described themselves as belonging to OBC category. The stand taken by the respondents that the case of the petitioner against general posts could have been considered only if she had applied as general category candidate cannot be appreciated in law. There insistence that since she applied only as a candidate belonging to OBC, her case could be considered against the posts reserved for that category alone cannot be approved. Their argument that the petitioner was free to choose either of the two categories and could apply also as a general category candidate is difficult to appreciate in the light of proposition of law settled by series of judgments rendered by Hon'ble Supreme Court. Such a procedure negates their right to consideration in keeping with the spirit of Articles 14 and 16 of the Constitution of India. What are often described as general posts, to borrow the expression used by their Lordships in Indra Sawhney, were in fact "in the open competition filed." Their Lordships referred to them as "non-reserved posts". One can call the category for which these posts belong, as unreserved category. In giving effect to the policy of reservation, the respondents have to broadly divide all posts only in two categories, one unreserved category and another reserved category. Reserved category can further be sub-divided into categories of OBC, SC and ST. They should first initiate the process of making appointment against the posts of unreserved category. In doing so, they have to consider all candidates irrespective of their category based on reservation whether OBC SC or ST. Having filled up all unreserved post, they can proceed to make appointment against the posts of reserved category in the order of merit from amongst the candidates available at that stage."

This very view has again been reiterated by Constitutional Bench of the Hon'ble Supreme Court recently in M. Nagaraj & Ors. Vs. Union of India 2006(8) 212 in para no.60 which runs as under:-

> "60. In Indra Sawhney Jeevan Reddy, J. noted that reservation under Article 16(4) does not operate on communal ground. Therefore, if a member from reserved category gets selected in general category, his selection will not be counted against the quota limit provided to his class. Similarly, in R.K. Sabharwal the Supreme Court held that while general category candidates are not entitled to fill the reserved posts, reserved category candidates are entitled to compete for the general category posts. The fact that considerable number of members of Backward Class have been appointed/promoted against general seats in the State services ma be a relevant factor for the State Government to review the question of continuing reservation for the said class."

Learned counsel for the respondents at this stage states that life of the select list has since expired on 31st March, 2004 and therefore the petitioner is not entitled to any relief. This argument can neither be appreciated nor accepted because the petitioner had approached this Court immediately after the selection process was completed within the year 2003 itself. Even though the last selected candidate in the general category Shri Prashant Acharaya

has been impleaded as respondent in the present writ petition, yet he has chosen not to contest the matter inspite of service. It would be for the respondents to decide whether or not to remove him or any other person who may have secured lesser marks than even him in making adjustment. The legitimate right of the petitioner cannot be defeated just because in the select penal has expired during the pendency of the writ petition because the petitioner had timely approached this Court and had even challenged the appointment granted to the last candidate in general category.

In the result, the writ petition is allowed. The respondents are directed to consider the case of the petitioner for appointment by placing him appropriately in the merit list of unreserved category (general category) immediately above the candidate, who secured lesser marks than him and if found suitable, appoint him on the post of Physical Training Instructor Grade-III with effect from the date on which such candidate was appointed. The petitioner shall however not be entitled to any monetary benefits for the intervening period for the reason that he has not actually served the respondents during such period.

His salary shall be arrived at notionally as if he was appointed on the date on which the candidates shown immediately below his in the said merit list was appointed. He shall however be entitled to seniority from the said date and consequential benefits of promotion and revision of pay scale etc. Compliance of this judgment should be made within a period of three months from the date of service a copy of this order.

There shall be no order as to costs.

(Mohammad Rafiq),J.

c.p.goyal/-